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No. 85-751

In the Supreme Court of the United States

OCTOBER TERM, 1985

MOTION PICTURE LABORATORY TECHNICIANS AND FILM AND TAPE EDITORS LOCAL 780, ETC., PETITIONER

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that it has a private right of action to challenge a federal agency's asserted failure to comply with Office of Management and Budget (OMB) Circular A-76, an Executive Branch policy directive establishing guidelines for contracting out to private industry for goods or services.

1. Petitioner represents employees of private firms that had contracts with or were subcontractors of the National Aeronautics and Space Administration (NASA) (Pet. App. 1a-2a). When NASA determined to transfer the work being performed by the private contractors to its own employees, petitioner brought this action against the agency in the

United States District Court for the Northern District of Illinois. Petitioner asserted that NASA's action was invalid because the agency had failed to conduct the comparative cost analysis mandated by OMB Circular A-76.[1] Pet. App. 2a, 3a-4a.

The district court dismissed the action, holding that petitioner lacked standing because its claim does not fall within the "zone of interests" protected by the Circular. The court recognized that the claims of government contractors themselves fall within the relevant zone (Pet. App. 7a). But it reasoned that "the immediacy of interest of employers is not in turn identical to any immediacy of interest of employees"; the benefit that employees would get from the reassignment of NASA's work to the private sector "is only a collateral (and really aleatory) consequence of the directly intended benefit to their employers" (*id.* at 8a).[2] The court of appeals affirmed in an unpublished order, adopting the district court's reasoning (*id.* at 2a).

3. While the standing analysis used by the district court is incomplete and therefore may be questionable,[3] its holding—that challenges to the implementation of the Circular are

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[1]The Circular is a management policy directive to Executive Branch agencies that establishes the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract or in-house using Government facilities and personnel. 44 Fed. Reg. 20577 (1979).

[2]In light of the district court's holding on standing, the court did not reach the question whether the agency's asserted noncompliance with the Circular was nonreviewable in any event (Pet. App. 5a & n.4).

[3]The district court was mistaken in suggesting that the drafters of the Circular completely disregarded the interests of private sector employees. In fact, the Circular creates an internal agency appeals procedure that may be used to challenge contracting out decisions; that procedure "protect[s] the rights of all affected parties," including "Federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives" (Pet. App. 41a).

nonjusticiable—plainly was correct. Like most OMB Circulars, Circular A-76 is an executive mangement policy directive issued pursuant to presidential budgetary and management authority. Such directives are "intended primarily as * * * managerial tool[s] for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). As such, they are not designed to implement any specific legislative mandate; instead, circulars such as the one at issue here are no different in principle from policy advice on the management of the Executive Branch given directly from the President to one of his officers. Circular A-76 thus is "binding" only in the sense that the President may choose to remove an Executive Branch officer who disregards its direction.

Whether an agency is complying with a Presidential directive of this sort plainly cannot be determined by a third party. An agency's compliance with a presidential policy directive is adequate to the extent that the President so determines; the Circular thus is interpreted and enforced internally, ultimately through the President's authority over appointed officials. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926). It follows that, "inasmuch as the Circular * * * '[is] merely [an] internal operating procedure[], rather than [a] regulation[] officially promulgated under the APA or otherwise, [it does] not prescribe any rule of law binding on [an] agency,' *Concerned Residents of Buck Hill Falls* [v. *Grant*], 537 F.2d [29,] 38 [(3d Cir. 1976)], and cannot be used as the basis for an attack upon [an agency's] decision." *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 582 n.28 (3d Cir. 1979). Circular A-76 itself expressly acknowledges this point, providing that it "does not establish, and shall not be construed to create,

any agency action or inaction on the basis that such action was not in accordance with this Circular." Pet. App. 24a.

Against this background, every court that has considered the question has held that challenges to the implementation of Circular A-76 are nonjusticiable. Because the Circular is designed to provide agency managers with policy guidance on how they are to carry out their tasks, courts have reasoned that implementation of the Circular necessarily involves "managerial choices inherently unsuitable for the judiciary to consider." *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). And because the Circular "appear[s] to be primarily a loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat[ing] a legally enforceable standard." *Local 2855, AFGE*, 602 F.2d at 582 n.28. See also *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1401 (9th Cir. 1985), petition for cert. pending, No. 85-777 ("Determining the most efficient configuration of government employees and resources * * * inevitably involve[s] 'questions of judgment'* * * which are properly committed to the informed discretion of [agency] management."); *AFGE* v. *Hoffmann*, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976) (Circular A-76 is a "managerial and policy tool[]" that is "not intended to provide benefits to plaintiffs"); *Griffin* v. *Department of Agriculture*, 2 M.S.P.R. 168, 171 (1980) ("The evaluation of [comparative costs under Circular A-76] is a matter committed by law to agency discretion").[4]

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[4]Petitioner is incorrect in asserting (at 9) that the legislative history of the Office of Federal Procurement Policy Act (OFPP), Pub. L. No. 93-400, 88 Stat. 796 *et seq.* manifests an intent to subject agency compliance with the Circular to judicial review. In fact, Circular A-76 was promulgated several years prior to the enactment of the OFPP. See

The result reached below thus is plainly correct, and comports with the holdings of the other courts of appeals that have addressed the justiciability of challenges to implementation of the Circular. Review of the court of appeals' unpublished order accordingly is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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44 Fed. Reg. 20556 (1979). Whether federal procurement regulations issued pursuant to the OFPP are reviewable in court is not relevant to the question here.